

EXHIBIT 40

Picard v. Merkin

Wilbur Kim 11-19-13

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor. Adv. Pro. No. 08-01789 (BRL)

IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,

Plaintiff, Adv. Pro. No.
09-1182 (BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION.

Defendants

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Videotaped Deposition of WILBUR KIM, held at the offices of Regus, 101 Federal Street, Boston, Massachusetts, pursuant to Agreement before Janet Sambataro, a Registered Merit Reporter, Certified Realtime Reporter, Certified LiveNote Reporter, and a Notary Public within and for the Commonwealth of Massachusetts, commencing at 1:46 p.m.

Reporter: Janet M. Sambataro, RMR, CRR, CLR

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2 A. Right.

3 Q. Who is Redacted?

4 A. Redacted.

5 Q. And Mr. Redacted of the Redacted
6 then says, "I remember well and each successive
7 conversation."

8 A. Right.

9 MR. KRISHNA: Maybe just take a little
10 break.

11 THE WITNESS: Fine by me. I'm okay
12 either way. I can move ahead.

13 MR. KRISHNA: Let's take a quick break.
14 Ten minutes or so.

15 THE VIDEOGRAPHER: The time is 2:50.
16 We're off the record.

17 (A recess was taken.)

18 THE VIDEOGRAPHER: We're back on the
19 record. The time is 3:04.

20 BY MR. KRISHNA:

21 Q. If we can turn back to Trustee
22 Exhibit --

23 A. 195.

24 Q. -- 195. I think there's where we left
25 off. It says, "I remember well in each

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2 successive conversation."

3 Do you recall any successive conversations
4 you had with anybody regarding the Redacted
5 investment in Ascot?

6 MR. PETRILLO: Objection to form.

7 A. I'm -- I'm sorry. What -- I'm trying
8 to be clear. What -- what do you --

9 Q. Forget the document for a second.

10 A. Okay.

11 Q. Do you recall any conversations you
12 had, after your meeting with Ascot, with anybody
13 else, regarding the investment?

14 A. Well, it would come up with Mr. Redacted
15 every, you know, every so often, because he's
16 still invested. And he would -- you know, it
17 would come up, and we would talk about it in the
18 sense of, well, here is the total portfolio.
19 Here is Ascot Partners, which we don't know how
20 they're doing, what they're doing.

21 And he would look at us and say, I know, I
22 know. I'm going to keep, you know, whatever it
23 was in there. Let's move on. So that's the
24 conversation Redacted is referring to.

25 Q. I see. And how often would you meet

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2 with Mr. Redacted?

3 A. In a normal year, you know, four or
4 five times a year.

5 Q. And what happened during these
6 meetings?

7 A. We would do what we normally do, which
8 is go through his portfolio, look at the asset
9 allocation, give a high-level description of kind
10 of what was driving the performance and then new
11 opportunities or any adjustments we wanted to
12 make to the program.

13 Q. And each time you said you would review
14 the Ascot investment?

15 A. I can't say that we did it every single
16 meeting. But I think, again, what Redacted would be
17 referring to is the fact that, periodically,
18 since '02 to this time frame, it would come up.

19 It could come up in conversation, just like
20 any investment we have in the portfolio. And,
21 you know, his decision by Mr. Redacted was to keep
22 that piece in.

23 Q. And following your meeting with
24 Mr. Merkin in 2002, did you do any subsequent due
25 diligence on BLMIS?

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2 A. I was not able to, because I was not
3 given any information to do anything.

4 Q. When you say you weren't given any
5 information, do you recall if Mr. Merkin gave you
6 access to BLMIS?

7 A. No. There was no access.

8 MR. PETRILLO: Sorry. Objection to
9 form.

10 Q. Did you request access to BLMIS?

11 A. We requested access. We requested to
12 have a meeting with anybody on the Madoff team.
13 And no offer of a meeting was -- was provided.
14 They basically -- the answer was no.

15 Q. And was there a reason given?

16 A. No. Other than they weren't taking
17 meetings.

18 Q. And what was your response?

19 A. That was not acceptable.

20 Q. And do you recall if Mr. Merkin had any
21 sort of follow-up?

22 A. No. I don't recall anything.

23 Q. And, then, so outside of from
24 Mr. Merkin, when you got back to Cambridge, did
25 you try to find -- what did you do from there?

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2 Q. And to get answers to these questions,
3 would you have been -- would you have been able
4 to get them from Mr. Merkin?

5 MR. PETRILLO: Objection to form.

6 A. So as I stated earlier, my focus was on
7 the investments, what the strategy is, how it was
8 conducted, and less and on the other stuff on
9 this page here, because unless I get satisfied
10 here, I'm not going to move on to the other set
11 of this process.

12 So I was focusing very much on understanding
13 is this an investment that I can understand, that
14 I can feel is sustainable, and attractive and
15 appropriate for my client. That's where I put
16 all my time and energy.

17 Q. And in order to get that understanding,
18 you needed access to BLMIS?

19 A. Yes. Because I was getting nothing
20 else from Mr. Merkin that would actually provide
21 me any of the information to that.

22 Q. But you weren't provided access?

23 A. I was provided nothing.

24 Q. So, therefore, your -- your
25 recommendation was what?

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2 A. To retreat -- to redeem, exit the
3 investment.

4 MR. KRISHNA: Thank you. I don't think
5 we have any further questions.

6 MR. PETRILLO: Very briefly.

7 CROSS-EXAMINATION

8 BY MR. PETRILLO:

9 Q. Sir, I'm Guy Petrillo. I represent,
10 for today's purposes, Mr. Merkin and Gabriel
11 Capital Corp., which is an entity that Mr. Merkin
12 at the relevant time controlled.

13 My question is, when you had the meeting
14 with Mr. Merkin that you've referred to today,
15 without guessing, without imagining, what do you
16 actually recall about the words spoken?

17 A. I can't recall specific words or
18 anything to that nature.

19 Q. Okay.

20 A. I can recall the experience in the
21 terms of the fact that I was not particularly
22 happy with the lack of information that I got.
23 That I can -- that I can recall.

24 Q. But sitting here today, for example,
25 can you say, one way or the other, whether you

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1 **WILBUR KIM**

2 **Disk No. 1 and the end of the deposition. The**
3 **time is 3:47. We're off the record.**

4 **(Deposition concluded at 3:47 p.m.)**

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